No. 06-618

In The Supreme Court of the United States

OFFICE OF SENATOR MARK DAYTON,

Appellant,

vs.

BRAD HANSON,

Appellee.

On Appeal From The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* PRESIDENT *PRO TEMPORE* OF THE SENATE OF PENNSYLVANIA, SUPPORTING APPELLANT

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INTEREST OF *AMICUS CURIAE*[1]

The legislative branch of Pennsylvania government is the General Assembly, which consists of a House and Senate. *Amicus Curiae* is the President *pro tempore* of the Senate ("President *pro tempore*").[2]

Within each of the two chambers there are two caucuses that are responsible for their own and their members' operations. For institutional operations, fiscal and personnel matters are handled, in the Senate, by the Chief Clerk under the direction of the President *pro tempore*. The caucuses' institutional duties include the administration of employment and personnel programs. These are handled largely through legislative management committees.[3] Each caucus hires legislative assistants and assigns

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the office of the *amicus* made a monetary contribution to the preparation of this brief. The parties consented to the filing of this brief, and copies of the parties' consents are on file with the Clerk of Court.

[2] The current President *pro tempore* is Senator Joseph B. Scarnati, III, who is a member of the Republican Caucus, which is currently the Majority Caucus.

[3] Section 2.2 of the Act of January 10, 1968, P.L. (1967) 925, *as amended*, 46 P.S. §42.102d, provides:

> The Majority and Minority Caucuses shall each establish a Legislative Management Committee which shall be composed of the Floor Leader who shall be chairman and so many additional caucus members as may be determined by each caucus. For the Majority Caucus, the President pro tempore, and for the Minority Caucus, the Minority Leader, shall each select a staff administrator who shall administer the fiscal and personnel matters of the caucus in conjunction with the Chief Clerk and perform such other duties as may be assigned.

them to positions in the capitol and in the district offices of individual senators throughout the Commonwealth.

Legislative assistants perform a variety of functions that are integral to the legislative process.[4] For example, legislative assistants are often involved in research that provides the basis for drafting bills. They are often also involved in the drafting of bills that will be sponsored by a member to whose office or caucus they are assigned. They will often draft amendments to bills sponsored by either that member or other members.

An important legislatively related duty is contact with constituents. Legislative assistants in district offices are often the initial, and sometimes the principal, point of contact between constituents and legislators. Legislative assistants listen to the concerns of citizens and pass them on to legislators. Legislative assistants also often inform constituents of legislators' positions on pending bills and convey the reaction of the constituency back to the representatives.

The only legislative functions that legislative assistants do not perform are the actual sponsoring, debating, and voting on measures that come before committees or to the floor of the Senate. Even debates and votes, though, are facilitated by the preparations and communications of

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[4] The term "legislative assistant" is not used here as a job title, but as a reference to any employee, regardless of title, who provides legislative support services to elected lawmakers, either individually or as a group. For example, it would include the parliamentarian, chief clerk, drafting attorneys, fiscal analysts, research assistants, legislative committee directors and counsel to a legislative committee, as well as staff in a legislator's district office who handle constituent communications.

legislative assistants that precede those formal actions, including informal negotiation with other legislative offices, state officials, or interested parties. A modern state legislature could not function without the help of such employees.

Because of the involvement of legislative assistants in public policy and constituent communication on behalf of legislators, it is essential that they enjoy the complete confidence of the legislators whom they serve. Moreover, their public conduct and their politics reflect on the legislators who employ them. They are the *alter egos* of the elected representatives.

From time to time, the employment of a legislative assistant is terminated, usually at the request of or with the concurrence of the legislator to whom the employee was assigned. However, the nature of the work of legislative assistants in public policy issues creates an enhanced opportunity for the former employee to claim, regardless of the actual grounds for termination, that the real reason was retaliation for the employee's exercise of First Amendment rights of political speech or political association. Claims of discrimination of one type or another are also not uncommon. A civil rights action in federal court can sometimes ensue.

Until now, such suits in federal court by terminated legislative assistants have been defendable by the assertion of legislative immunity, which for state legislators is

coterminous with the "Speech or Debate" immunity of their congressional counterparts.[5]

In the instant case,[6] the United States Court of Appeals for the District of Columbia Circuit held that the immunity conferred by the Speech or Debate Clause of the United States Constitution did not apply to personnel decisions of members of Congress or their congressional offices. The D.C. Circuit overruled its decision in *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir. 1986), that the Speech or Debate Clause protects employment decisions concerning any employee whose job duties are "directly related to the due functioning of the legislative process." 789 F.2d at 929.

The Majority opinion for the D.C. Circuit looked at the legislative process with a very narrow field of vision that excludes what in real life is the greater part of the process. The court held that the "integral" parts of the process only include making a speech, engaging in debate, proposing

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[5] The Speech or Debate Clause of the United States Constitution, U.S. CONST. art. I, §6, cl. 1, does not apply *per se* to state legislators sued in federal court. Similar provisions in state constitutions, e.g., PA. CONST. art. II, §15, cannot shield a state official from a federal cause of action. Nevertheless, state legislators have "common-law immunity from liability for their legislative acts . . . that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732 (1980). Thus, when legislative immunity applies, state legislators are as immune from suit in federal court as their federal counterparts. *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951). Accordingly, the standards for determining legislative immunity will be the same regardless if the defendant is a member of Congress or a state legislator.

[6] Reported *sub nom. Fields v. Office of Eddie Bernice Johnson* and *Hanson v. Office of Senator Mark Dayton*, 459 F.3d 1 (D.C. Cir. 2006).

and voting on legislation, preparing and using legislative reports, authorizing investigations, and holding hearings. The court's list is akin to an elementary primer in how a bill becomes law, but overlooks the behind-the-scenes role of staff work and constituent communications. In overruling *Browning*, the D.C. Circuit rejected the notion that legislative immunity protects "personnel decisions" as it previously held in *Browning*, regardless of the duties of the employee discharged. The Majority opined that personnel decisions lack a nexus to the kinds of legislative activities it identified. Recognizing that Speech or Debate immunity would play some role in the case on remand, the D.C. Circuit offered various thoughts, in *dicta* in the majority and concurring opinions, on how immunity could affect a plaintiff's ability to prove a case.

The D.C. Circuit's decision has the collateral effect of practically obliterating legislative immunity for state legislators' personnel decisions affecting legislative assistants. Indeed, the United States Court of Appeals for the Third Circuit in *Fowler-Nash v. Democratic Caucus*, 469 F.3d 328 (3d Cir. 2006), relying in part on the D.C. Circuit's decision, recently concluded that neither state legislators nor their caucuses have legislative immunity from suit in federal court for personnel decisions affecting legislative assistants.

The D.C. Circuit's decision creates a dilemma for every legislator. One must hire legislative assistants, because they are essential to the legislative process. Yet, once hired, they cannot be fired without subjecting legislators to the potentially heavy burden of defending a lawsuit. Immunity was supposed to relieve them of that burden. The D.C. Circuit's speculation about a residual immunity for evidentiary purposes does not relieve them

of the burden of defense. On the contrary, the abrogation of immunity as a bar to claims may well put pressure on legislators to waive immunity for evidentiary purposes, in order to counter the plaintiff's case.

Amicus curiae believes that treating legislative personnel decisions as unrelated to the legislative process is an artificial and unrealistic dichotomy. *Amicus curiae* therefore submits this brief in support of the Office of Senator Mark Dayton.

SUMMARY OF ARGUMENT

Legislative immunity applies to personnel decisions regarding legislative assistants, because of the integral role they play in the legislative process. Their duties directly affect the legislative process. In evaluating any immunity question regarding the discharge of legislative assistants, their job duties must be taken into consideration. The D.C. Circuit abandoned its decision in *Browning* which concluded, rightly, that legislative employers should have immunity from suit for personnel decisions impacting integral legislative employees that affect the legislative process. By abandoning *Browning* and its reasoned approach to legislative immunity from suit for legislative personnel decisions, the D.C. Circuit increased judicial involvement in legislative affairs. This Court should clarify that its decision in *Forrester v. White*, which has been invoked by courts of appeal to deny legislative immunity for personnel decisions, is not a blanket rule that applies in every circumstance where governmental immunity is claimed but is, instead, a case which implicitly recognizes

the distinctions between the nature of judicial and executive functions.

ARGUMENT

I. LEGISLATIVE IMMUNITY APPLIES TO PERSONNEL DECISIONS.

Legislative immunity extends beyond mere "speech" or "debate" on the house floor. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881) ("It would be a narrow view of the constitutional provision to limit it to words spoken in debate."). This immunity has constitutional moorings and is designed to protect legislators and legislatures from defending lawsuits so they may carry out their lawmaking functions. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975) (protecting legislators "'not only from the consequences of litigation's results but also from the burden of defending themselves.'") (internal citations omitted).

Litigation that results from the allegations of former assistants or aides of legislators, no less than any other type of lawsuit, distracts legislators and the institution itself from their function of lawmaking. *Gravel v. United States*, 408 U.S. 606, 625 (1972); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty[.] . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.").

Legislative immunity serves an important institutional function of preventing unwarranted judicial intrusion into the day-to-day affairs of the legislature. *United States v. Johnson*, 383 U.S. 169 (1966) ("The legislative privilege, protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary, is one manifestation of the 'practical security' for ensuring the independence of the legislature."); Thomas Jefferson (and James Madison), *Protest to the Virginia House of Delegates* (1797), *reprinted in* 2 THE FOUNDERS' CONSTITUTION 336 (Philip B. Kurland & Ralph Lerner eds. 1987) ("[F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other . . . is to put the legislative department under the feet of the Judiciary. . . .").

Thus, regardless of motive, activities that fall within the "legitimate legislative sphere" cannot be questioned in the courts. *Eastland*, 421 U.S. at 503 ("We reaffirm that once it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference."); *see Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (the legitimate legislative sphere is determined "stripped of all considerations of intent and motive").

Personnel decisions affecting certain critical legislative employees fall within the "legitimate legislative sphere." As this Court has noted, a necessary element of legislative activity is the employment of staff to assist legislators in their work. *Gravel*, 408 U.S. at 625 ("[I]t is literally impossible . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants; . . . the day-to-day work of such aides is so

critical to the Members' performance that they must be treated as the latter's alter egos[.]"). Indeed, certain employees are so necessary to the function of legislatures that they are, in effect, the "alter ego" of the legislators whom they serve and are even entitled to the very immunity that clothes their legislative employer. *Gravel*, 408 U.S. at 625; *See Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (*per curiam*) (expanding legislative immunity to cover officers/employees of legislative bodies).

The application of legislative immunity to personnel decisions must therefore be evaluated by focusing on the duties of the legislative employee and the impact those duties have on the legislative process or the legislature itself. *Gravel*, 408 U.S. at 625 (immunity conferred by the Speech or Debate Clause extends to legislative assistants whose employment activities are integral to the legislative process); *Davis v. Passman*, 442 U.S. 228, 254 (1979) (Powell, J., dissenting) ("Whether or not the employment decisions of a Member of Congress falls within the scope of the Speech or Debate Clause of the Constitution, a question the Court does not reach today, *it is clear that these decisions are bound up with the conduct of his duties.*") (emphasis added). The D.C. Circuit in this case overruled its decision in *Browning* and declined to evaluate the duties of legislative assistants in determining whether personnel decisions affecting those employees fall within the legitimate legislative sphere of activities that should not be questioned by the courts.

By definition, "legislative assistants" assist legislators to carry out their legislative function. Legislative assistants often speak on behalf of the legislators whom they serve and represent to the public the position of their legislators. Similarly, many legislative assistants research

the law, track legislation, and even assist in drafting bills. Because legislative assistants research and track legislation, they are in a prime position to, and often do, discuss with their legislator his or her position on matters pending in the House or Senate and advise their legislator on how to vote on pending legislation. *See, e.g.*, Note, *The Speech or Debate Clause Protection of Congressional Aides*, 91 YALE L.J. 961, 969-70 (1982) ("By any measure, the workload of Congress has expanded enormously in the last several decades. Staff sizes have been enlarged dramatically to keep pace. Congressional aides now play vital roles in almost every aspect of the legislative process, from drafting bills and speeches to conducting investigations.").

Legislative assistants play a necessary role in the communicative and representative aspect that directly impacts legislation. Legislative assistants are, in effect, the front line of the information-gathering process. Legislative employers rely upon and need this information in order to represent their legislative districts adequately. Legislative assistants take information that they receive from the constituency (regarding anything from pending or desired legislation to constituent complaints or concerns) and relay that information back to the legislators for whom they work. *See, e.g.*, *Hobler v. Brueher*, 325 F.3d 1145, 1152 (9th Cir. 2002) ("Without a confidential secretary the official can trust to carry out his views, funnel communications in and out according to his priorities, and represent him in a way that enhances rather than damages his reputation, an elected official cannot effectively perform his office.").

Legislators formulate public policy with the input or assistance from their legislative assistants. This is the essence of legislating in a representative democracy:

> Legislators regularly use staff to gather information on controversial or sensitive subjects so that they can identify the magnitude of a problem and decide whether it is susceptible to a legislative solution. Hearings and subpoena authority are important means to this end, but preliminary and less formal methods of information gathering are often needed as well if Congress is to develop and maintain an adequate knowledge base. Similarly, members and their staffs frequently contact executive agencies as part of an effort to assess the burdens of compliance with a given statute or the extent of noncompliance with that law. While the contacts may be triggered by constituent requests or protests, the resulting assessment may well produce an amendment to the existing legislative scheme. Finally, disseminating information to the public can be a central part of members' attempts to generate broad support on a pending legislative matter. In an era when public opinion survey results help set the priorities for Congress's legislative agenda, members may seek to influence scheduling determinations through aggressive efforts to elevate public awareness of their issues.
>
> Each of these activities – gathering information, contacting agencies, and publicizing positions – is part of the business of legislating.[7]

James J. Brudney, *Congressional Accountability and Denial: Speech or Debate Clause and Conflict of Interest Challenges to Unionization of Congressional Employees*, 36 HARV. J. ON LEGIS. 1, 44 (1999).

[7] The same is true for state legislators.

In essence, legislative assistants collect the information that forms their legislator's basis for voting and policy development. Brudney, *supra*, at 64-65 ("Legislators are elected at least in part because voters perceive that they share various communities of interest with some or all of the legislator's constituents."). Without legislative assistants contacting constituents, fielding communications from constituents, and meeting with constituents (and even persons and groups outside their constituency), legislators would be legislating in a vacuum and representing their constituents without input from the public they represent. *Cf. Faughender v. City of North Olmstead, Ohio*, 927 F.2d 909, 914 (6th Cir. 1991) ("As political action cannot occur without communication, a position that controls the lines of communication of a political actor must be inherently political.").

The nature of legislative assistants' duties furthermore places them in a position of confidence with their legislative employers, who must rely to a significant degree on their staff in order to carry out their legislative and representative functions. *See, e.g., Davis v. Passman*, 442 U.S. 228, 254 (1979) (Powell, J., dissenting) ("Because of the nature of his office, [a legislator] must rely to an extraordinary extent on the loyalty and compatibility of everyone who works for him. . . . A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence."). As then Chief Justice Burger aptly noted in his dissenting opinion in *Davis*:

> Historically, staffs of Members have been considered so intimately a part of the policymaking and political process that they are not subject to

> being selected, compensated, or tenured as others who serve the Government. The vulnerability of employment on congressional staffs derives not only from the hazards of elections but also from the imperative need for loyalty, confidentiality, and political compatibility – not simply to a political party, an institution, or an administration, but to the individual Member.

Davis, 442 U.S. 249-50 (Burger, J., dissenting).

As state government grows in complexity, so do the duties of legislators. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 226-27 (2003) ("The increased professionalization of state legislatures, combined with the growing complexity of issues facing them and the devolution of authority from the federal government to the states, are propelling more issues of state legislative privilege into the courts.").

As the duties of legislators increase, they must necessarily rely on legislative assistants to assist in carrying out legislative functions and should therefore be immune from suit for decisions affecting those employees. *See* Joint Committee on Congressional Operations on the Legislative Role of Congress in Gathering and Disclosing Information, The Constitutional Immunity of Members of Congress, S. Rep. No. 896, 93d Cong., 2d Sess. 47, 53 (1974) (Speech or Debate Clause immunity should include "any activities undertaken within the legislative branch in fulfilling the role of the Congress in the constitutionally defined government of coordinate and coequal branches.").

Because of the important role legislative assistants play in the legislative process, they are confidential

employees of policymakers. Persons who are confidential or policy-related employees can be discharged even for exercising what would otherwise be rights protected under the First Amendment. *See Garcetti v. Ceballos*, __ U.S. __, 126 S. Ct. 1951, (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *Elrod v. Burns*, 427 U.S. 347 (1976).

Invariably, legislative assistants (like other confidential employees) (1) have access to a policymaker's confidential information and (2) are involved in the policymaker's channels of communication. *See, e.g., Faughender v. City of North Olmstead, Ohio*, 927 F.2d 909, 913-14 (6th Cir. 1991) ("Viewed in its functional aspect, a mayor's secretary is clearly the type of position that involves access to confidential and political material, and political loyalty, whether partisan or personal, is an essential attribute of the job."); *Hobler v. Brueher*, 325 F.3d 1145, 1155 (9th Cir. 2002) ("Without a confidential secretary the official can trust to carry out his views, funnel communications in and out according to his priorities, and represent him in a way that enhances rather than damages his reputation, an elected official cannot effectively perform his office."); *Weisel v. Hooks*, 277 N.J. Super. 78, 648 A.2d 1166, 1170 (1994) ("By assuming a position of confidence such as the secretary to a high-level cabinet officer, an individual assumes a degree of knowledge and access which limits his or her ability to associate freely and without restriction even though such conduct might otherwise be protected by the Federal or State Constitutions.").

The close, confidential nature of the relationship between legislator and legislative assistant assures legislators that they can openly discuss and debate even the most sensitive issues of policy and have input from their close advisors on these matters. Huefner, *supra*, at 285-86 ("[R]oom remains to recognize the value of behind-the-scenes negotiation, confidential advice from aides, and other internal aspects of the deliberative process that deserve to be 'as free from bias or pressure as possible.'").

It is therefore incongruous to recognize the indispensability of legislative assistants to the legislative process and, then, to refuse to consider the nature of their jobs in an employment termination lawsuit when legislative immunity is raised. It is likewise unrealistic to assume that a legislator formulates public policy single-handedly, without the input or assistance from his or her legislative assistants. A legislator relies on his or her legislative assistant as surely as a judge relies on his or her law clerk to research the law, draft opinions, and participate in the judicial decision making process.

By necessity, the decision to hire or discharge legislative assistants directly impacts the legislative process from the initial fact-gathering process to final enactment of a bill and all points in between. Personnel decisions affecting those employees fall within the legitimate legislative sphere that legislative immunity shields from questioning.

II. THE D.C. CIRCUIT'S DECISION INCREASES JUDICIAL INVOLVEMENT IN LEGISLATIVE AFFAIRS.

The decision in this case affords the judiciary a role in what should be purely legislative matters. If this Court affirms it, state legislatures can anticipate an increase in employment law claims, more complicated lawsuits to defend those claims, and more litigation involving discovery disputes. In turn, the judiciary's role in legislative employment matters increases. So long as a plaintiff alleges termination for any "improper" reason (one that does not involve what the D.C. Circuit has defined as a "legislative" act), the cause of action survives. As a result, federal courts may become the "human resources department" of state legislatures and the Congress.

Legislative immunity is no longer absolute if this decision stands. The circuit court wrongly assumed that *Browning* was "overinclusive" because it extended immunity to personnel actions that were motivated by factors other than performance of the employee directly on legislative matters. *Fields*, 459 F.3d at 11. The circuit court lost sight of the fact that the nature of immunity is to be overinclusive. It protects the holder of the privilege, right or wrong, from suit. Legislative immunity is not for the benefit of the individual legislator but for the public to whom legislators owe a duty of uninterrupted public service without the distractions of lawsuits contrived by disgruntled employees. *Coffin v. Coffin*, 4 Mass. 1, 27 (1808) ("These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil

or criminal."); Huefner, *supra*, at 227 ("In addition, society's increasing propensity to litigate and contemporary distrust of government almost guarantee that disaffected individuals – and even some political opportunists – will seek creative ways to gain relief through, extract information from, or merely harass or burden, elected state representatives.").

The D.C. Circuit's approach, in effect, strips immunity from legislators when they are deemed to have been in the wrong, vesting them with "immunity" only when they can prove that they were in the right. This is not immunity at all. It is merely a chance for non-liability, which, moreover, the legislator would have the burden of proving if the court's decision is upheld.

The D.C. Circuit's decision invites judicial inquiry into legislative motives. Legislative immunity, as properly conceived in *Browning*, avoided all inquiry into a legislator's motives. *See Tenney*, 341 U.S. at 377 ("The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned"). In contrast, the circuit court's decision in this case will precipitate discovery battles in which the compulsory process of the courts will be used to probe into legislators' motives to try to distinguish directly legislative from non-legislative motives, the actual from the pretextual, and the seemly from the unseemly. In many cases, if *Fields* is upheld, the courts will likely end up confronting legislators with the choice of losing a lawsuit or, by testifying, shedding even the remaining rags of immunity with which they are clothed.

The D.C. Circuit's decision also precipitates increased litigation involving legislators. If upheld, legislative

defendants will bear the burden of defending themselves for every employment action taken, regardless of the employee's duties in the legislative process. Virtually any disagreement with the legislator over policy or other "political" choices, if followed by a termination of employment, could result in a federal cause of action under 42 U.S.C. §1983 simply if the legislative assistant claims in a pleading that he or she was discharged allegedly in violation of the right to engage in political speech or to political affiliation under the First Amendment.

Finally, the D.C. Circuit's decision increases the risk of waiving privileged information about the legislative process. If legislative immunity is merely an evidentiary privilege, as the court seems to suggest, the legislative defendant has a burden to produce evidence that the employment action involved an integral component of the legislative process. If the legislative defendant discloses too little information (in a court's judgment), immunity does not attach. If the legislator discloses too much, the privilege may be waived.

III. LEGISLATIVE IMMUNITY DIFFERS FROM OTHER TYPES OF IMMUNITY.

Like other circuit courts of appeal, including the Third Circuit recently in *Fowler-Nash*, the D.C. Circuit was swayed at least in part by this Court's decision in *Forrester v. White*, 489 U.S. 219 (1988).[8] *See Fields*, 459 F.3d at 12-13 ("Later decisions cast doubt on *Browning*. Two years

[8] *Fowler-Nash* relied almost exclusively on *Forrester* to conclude that the act of terminating an employee is *per se* an administrative act not shielded by immunity. *Fowler-Nash*, 469 F.3d at 337.

after *Browning*, the Supreme Court ruled that a state-court judge did not have "absolute immunity from a suit for damages under 42 U.S.C. § 1983 for his decision to dismiss a subordinate court employee.")

Forrester employed a "functional" approach to questions of immunity, other than the immunity conferred by constitutional provision or statute,[9] to determine whether an Illinois judge who demoted and later fired a probation officer was entitled to judicial immunity. *Id.* at 224 ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, *we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted*, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.") (emphasis added).

The judge claiming judicial immunity in *Forrester* had two "functions" – an executive branch function (as supervisor of probation officers) and a judicial branch function. Under Illinois law, adult and juvenile probation officers were to be hired and fired by the chief judge (or another judge designated by the chief judge) of the circuit courts. The Court concluded that the judge's decision to fire the

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[9] The Court's functional approach ostensibly applies only to types of immunity "*other than* those that have been decided by express constitutional or statutory enactment. . . . This Court has generally been quite sparing in its recognition of claims to absolute official immunity. One species of such legal protection is beyond challenge: the legislative immunity created by the Speech or Debate Clause, U.S. Const., Art. I, § 6, cl. 1." *Forrester*, 484 U.S. at 224, 230-31.

probation officer was not a "judicial act" for which he had judicial immunity.

The probation officer in *Forrester* was employed by the state circuit court not because of inherently judicial functions of the job, but because of an idiosyncrasy of Illinois law.[10] Probation officers perform inherently executive functions in supervising the conduct of persons convicted of crime. Their functions can also be prosecutorial, when the conditions of probation are violated. Their reports and testimony have weight as evidence in probation hearings. However, providing evidence to a court is not an adjudicative function; it is inherently adversarial. Finally, probation officers can have police powers, including the power of arrest.[11] For these reasons, probation officers can be categorized as functioning in an executive-branch capacity.

This Court's functional analysis was necessitated by the fact that a judge was carrying out the executive function of discharging an executive-branch-type employee (a probation officer). *Forrester* did not disturb the functional analysis of immunity questions that otherwise runs

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[10] Probation officers in other states are either employed by executive branch officers or by the courts. For example, Massachusetts probation officers are appointed by the Commissioner of Probation. MASS. GEN. LAWS ANN. ch. 276, §83. In Pennsylvania, some probation and parole officers are employed by the Courts of Common Pleas (generally handling cases where the sentence is less than two years), while others work for the state Board of Probation and Parole (an executive agency that, generally, handles longer sentences). *See* 61 P.S. §314 and 61 P.S. §331.2 *et seq.*

[11] E.g., in Pennsylvania, both state and county probation and parole officers are "peace officers" who have police power and authority to arrest "without warrant, writ, rule or process" any probationer or parolee. *See* 61 P.S. §309.1 and §331.27.

through the case law. Instead, *Forrester's* functional analysis showed simply that the judge's action was no different than that for which executive branch officials might be sued. *See id.* at 229-30. Although *Forrester* did not parse the detailed job description of probation officers, the case recognizes the distinctions between the nature of judicial and executive functions.

If the judge in *Forrester* had, on the same day, fired a law clerk as well as the probation officer, the functional analysis would lead to the conclusion that the judge would have judicial immunity against a suit by the former, but no judicial immunity (although perhaps a qualified executive immunity) against a suit by the latter. The judge would have immunity from a suit by the law clerk, because the clerk's job is an integral part of the judicial function of the court. The judge would be immune regardless of any alleged motive for the law clerk's firing (e.g., if the clerk were fired for exercising freedom of speech to criticize the reasoning of the judge's opinions). The judge is entitled to have absolute confidence in one who participates in judicial functions. When firing the probation officer, in contrast, the judge would be wearing his executive-branch hat, addressing the functioning of the probation department.[12] In both cases, the judge is taking a personnel

[12] The degree of separation, or commingling, of judicial and executive functions in the courts or in any other branch is a matter of choice for a state. The states are free to structure themselves as they see fit and need not adhere to the doctrine of separation of powers applicable to the federal government. *See Alden v. Maine*, 527 U.S. 706, 752 (1999). However, even federal judges could find themselves supervising some executive functions, if Congress were to delegate such tasks. The Constitution provides that the President appoints certain officers, but allows Congress to "vest the appointment of such inferior

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action. The focus of a proper functional analysis, though, should be on the nature of the program in which the personnel serve.

A similar functional analysis of a legislative assistant's job shows that the work is integral to the legislative function. Just as a judge must have complete confidence in a law clerk, so a legislator must have complete confidence in a legislative assistant. Judicial functions must be performed impartially and, of course, without regard to politics. In contrast, legislative functions are inherently political. The legislator's reliance on the legislative assistant therefore necessarily includes having the assistant be in harmony with the legislator on political issues.

Recognition of this difference makes it even more important to apply "Speech or Debate" immunity to employment decisions affecting personnel who are involved in the legislative process. Without such immunity, every personnel action could become a lawsuit, based, *inter alia,* on allegations of political differences and the First Amendment.

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officers, as they think proper, in . . . the courts of law. . . . " U.S. CONST. art. II, §2.

CONCLUSION

Amicus curiae the President *pro tempore* of the Senate of Pennsylvania requests that this Court reverse the judgment of the Court of Appeals for the reasons stated above.

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